15-XXXX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 15-XXXX

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AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MEMORANDUM OF LAW OF THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE ARMY IN SUPPORT OF THEIR MOTION FOR A STAY PENDING APPEAL

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Defendants-Appellants the United States Department of Defense ("DoD") and United States Department of the Army (the "Army") (collectively, the "Government") respectfully submit this memorandum of law in support of their motion for a stay pending appeal.

Preliminary Statement

This appeal arises out of a long-running Freedom of Information Act ("FOIA") case, brought in 2004 by the ACLU and others ("plaintiffs"), against a number of federal agencies seeking records relating to treatment of detainees held by the United States outside the territory of the United States. DoD and the Army are the only remaining defendants, and the only remaining records at issue are certain photographs responsive to plaintiffs' FOIA request (the "DoD Photographs").

Most recently, on March 20, 2015, the district court (Alvin K. Hellerstein, J.) ordered the disclosure of the DoD Photographs, despite a certification from the Secretary of Defense that, pursuant to the Protected National Security Documents Act ("PNSDA"), disclosure would endanger U.S. citizens and armed service personnel deployed overseas. The district court stayed its order for 60 days, until May 19, 2015, to allow the Solicitor General time to determine whether to pursue an appeal. The district court stated, however, that any further stay must come from this Court. Having decided to appeal, the Government now seeks a stay of the district court's order pending its appeal to this Court.

The Government is entitled to a stay here because, as in all FOIA cases, disclosure of the records at issue—here, the DoD Photographs—would moot the Government's appeal. Disclosure of the photographs would also cause the Government irreparable injury. As Secretary Panetta determined, public disclosure of the DoD Photographs would endanger U.S. citizens, members of the U.S. Armed Forces, or U.S. Government employees abroad. That determination

is entitled to deference and is not to be second-guessed. The district court, however, failed to credit that determination, instead concluding that it was required to conduct a broad, *de novo* review of the factual basis for the Secretary's certification. That approach was not only misguided, but also inconsistent with the district court's previous determination that Secretary Gates's certification, which pertained to the same DoD Photographs and was "virtually identical" to Secretary Panetta's certification, should be upheld.

Statement of the Case

A. The Litigation and the Previous Appeal

This is the second time the potential disclosure of the DoD Photographs will come before this Court. A decade ago, in 2005, the district court first ordered the release of the DoD Photographs, which the Government had withheld pursuant to FOIA Exemptions 6, 7(C), and 7(F). The Government appealed, and this Court affirmed the district court's decision, rejecting the Government's Exemption 7(F) argument and holding that potential harm to large groups of people (such as U.S. troops or civilians in Afghanistan and Iraq) does not meet the exemption's requirement to identify harm to "any individual." *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008). The Court denied the Government's request for rehearing en banc. The Government filed a petition for a writ of certiorari.

B. The Protected National Security Documents Act and the 2009 Certification

While the Government's petition for certiorari was pending, Congress passed the Protected National Security Documents Act ("PNSDA"). *See* Pub. L. No. 111-83, 121 Stat. 2142, § 565. The PNSDA provides that:

> Notwithstanding any other provision of law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code or any other proceeding under that section.

PNSDA, § 565(b). To fall within the definition of a "protected document," a record must be a "photograph," which is further defined under the statute, and must have been created between "September 11, 2001 through January 22, 2009." *Id.* § 565(c)(1)(B)(i). The photograph must also "relate[] to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States." *Id.* § 565(c)(1)(B)(ii). Finally, a photograph is a protected document when the Secretary has issued a certification "stating that disclosure of [the photograph] would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." *Id.* § 565(c)(1)(A). The PNSDA mandates that the Secretary "shall issue [such] a certification" any time that he makes such a determination. *Id.* § 565(d)(1).

The PNSDA further provides that any such certification "shall expire 3 years after the date on which the certification . . . is issued by the Secretary of Defense." *Id.* § 565(d)(2). The PNSDA allows for the Secretary to issue "a renewal of a certification at any time," although, like the original certification, a renewal certification will expire 3 years after the Secretary issues it. *Id.* § 565(d)(2), (d)(3). Finally, the PNSDA provides for direct Congressional oversight of any certification issued under the PNSDA by requiring the Secretary to provide "timely notice" to Congress when he issues a certification or renewal certification. *Id.* § 565(d)(4).

In November 2009, then-Secretary of Defense Robert Gates signed a certification with respect to the DoD Photographs at issue in this case. The Gates certification explains that before its issuance, the Secretary consulted with "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of the Multi-National Forces-Iraq," each of whom agreed with the Secretary's determination that "public disclosure of these

photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." SDNY Docket No. ("Dkt") 458 (Certification of Secretary Gates, Exhibit G to Declaration of Amy Barcelo, dated April 1, 2011).

The Supreme Court subsequently granted the Government's petition for certiorari, vacated this Court's judgment, and remanded this action for further consideration in light of the PNSDA and Secretary Gates's certification. *See DOD v. ACLU*, 558 U.S. 1042 (2009). This Court then remanded the action to the district court. On remand, the district court granted summary judgment for DoD, concluding that Secretary Gates's certification supported the withholding of the DoD Photographs pursuant to the PNSDA. *See* Dkt. 474 (Transcript of Oral Ruling on July 20, 2011).

C. The District Court's Rejection of Secretary Panetta's 2012 Certification

In November 2012, then-Secretary of Defense Leon Panetta signed a renewal certification. The new certification, as the district court recognized, is "virtually identical" to the 2009 certification. Dkt. 513 (Order of August 27, 2014 at 5). The renewal certification explains that the Secretary consulted with "the Chairman of the Joint Chiefs of Staff, the Commander of the U.S. Central Command, and the Commander of International Security Assistance Force/United States Force Afghanistan," each of whom agreed with the Secretary's determination that "public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside of the United States." Dkt. 497 (Renewal Certification of Secretary Panetta, Exhibit D to Declaration of Amy A. Barcelo, dated February 11, 2014).

Because this case had remained open as to other, unrelated issues, the district court revisited the certification issue on renewed cross-motions for summary judgment. In August 2014, the district court entered an order concluding that Secretary Panetta's recertification was not sufficient to withhold the DoD Photographs. The district court first rejected the notion that its prior ruling, upholding Secretary Gates's certification, compelled it to uphold Secretary Panetta's recertification, even though the certifications are "virtually identical." Dkt. 513 (Order of August 27, 2014, at 5). The district court stated that in 2009, it had "essentially conducted a *de novo* review" of Secretary Gates's certification, and had concluded that the PNSDA was passed in order to support the President's determination that these images should not be disclosed. *Id.* at 9. The district court reasoned, however, that that ruling did not control review of Secretary Panetta's recertification, which "was issued under different circumstances." *Id.* at 10. The district court explained that, at the time of Secretary Panetta's certification, "the United States' combat mission in Iraq had ended (in December 2011), and all (or mostly all) American troops had been withdrawn from Iraq," *id.*, and therefore "[g]iven the passage of time, I have no basis for concluding either that the disclosure of photographs depicting the abuse or mistreatment of prisoners would affect United States military operations at this time, or that it would not," *id.* at 11.

The district court further determined that it should conduct *de novo* judicial review of the Secretary's certification, to include review of whether the Secretary had a sufficient factual basis to conclude that release of the photographs at issue would endanger U.S. citizens, military personnel, or employees abroad. *Id.* at 16. Because the court determined on its own that the record did not include adequate information to support Secretary Panetta's determination of

harm, the court provided the Government with an opportunity to create a record to "support[] the factual basis" for its assertion that the photographs should be withheld. *Id.* at 16.

The district court also determined that the PNSDA requires the Secretary to consider each photograph individually, rather than collectively. *Id.* at 18. The court held that "[c]onsidering the photographs individually, rather than collectively, may allow for more photographs to be released, furthering FOIA's 'policy of full disclosure.'" *Id.* at 19. The court held that the 2012 recertification, however, suggested that the Secretary reviewed the photographs as a collection. *Id.* at 19. Thus, the court concluded that the certification was insufficient. *Id.* at 19. The court also provided the Government with an opportunity to submit additional evidence into the record to demonstrate that the Secretary of Defense considered each photograph individually. *Id.* at 20.

The Government subsequently supplemented the record with a declaration explaining the process leading to the renewal certification, which included obtaining recommendations from the Commander of U.S. Forces in Afghanistan, the Commander of U.S. Central Command, and the Chairman of the Joint Chiefs of Staff. Dkt. 530 (Exhibits A-C). The Government argued that its declaration established that DoD conducted an individualized review of each of the photos and that the three recommendations relied upon by Secretary Panetta in making his recertification provided more than ample basis for his conclusion that public disclosure of the photos would endanger U.S. citizens, members of the Armed Forces, or U.S. Government employees deployed abroad.

In February 2015, the district court held a hearing, at which it indicated that the court found the additional materials submitted by the Government insufficient to satisfy the PNSDA. The district court then entered an order stating that the "Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders'

conclusions," in order to certify such photographs. Dkt. 543 (Order of February 18, 2015, at 2). "He may obtain such knowledge either by reviewing the photographs personally or having others describe their contents to him," the district court continued, "but he may not rely on general descriptions of the 'set' of 'representative samples,' as such aggregation is antithetical to individualized review without precise criteria for sampling." *Id.* at 2-3. The court also stated that the certification must make clear "the Secretary's factual basis for concluding that disclosure would endanger U.S. citizens, Armed Forces, or government employees." *Id.* at 3. "At a minimum, the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content." *Id.*

The district court provided the Government with another opportunity to make further submissions, *id*., which the Government declined given the considerable material it had already submitted, Dkt. 547 (Letter from AUSA Sarah Normand to Judge Alvin K. Hellerstein, dated March 17, 2015, at 2), and the district court ordered the disclosure of the photographs on March 20, 2015, Dkt. 549 (Order of March 20, 2015, at 2). Final judgment was entered on April 1, 2015. Dkt. 552.

ARGUMENT

I. Seeking a Further Stay from the District Court Would Be Impracticable

Although the district court granted the Government's request for a 60-day stay of the district court's disclosure order to allow the Solicitor General to make a determination regarding appeal, it made clear that "any subsequent stays must be issued by the Court of Appeals." Dkt. 549 (Order of March 20, 2015, at 2). In light of that holding, the Government is not required to seek a further stay of either the March 20, 2015 Order or the April 1, 2015 Order of Final

Judgment in the district court because to do so would be impracticable.

While "[a] party must ordinarily move first in the district court for . . . a stay of the . . . order of the district court pending appeal," Fed. R. App. P. 8(a)(1), a party may move for such relief in the court of appeals if it can show either that "moving first in the district court would be impracticable," or that the district court denied a motion for such relief or "failed to afford the relief requested," Fed. R. App. P. 8(a)(2). Since the district court has already indicated that any further stay must come from this Court, any motion made in the district court to further stay the district court's orders pending appeal would be futile. *See Chemical Weapons Working Group v. Dep't of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996) ("When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable.")

II. This Court Should Grant a Stay Pending Appeal

The Court should grant a stay pending an appeal of the district court's order to disclose the photographs at issue. As in any FOIA case, the disclosure of these photographs would moot the appeal and cause the Government irreparable injury.

Courts consider four factors when determining whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted). "[T]he degree to which a factor must be present varies with the strength of the other factors"; "more of one factor excuses less of the other." *Id.* (quotation marks, alterations omitted).

The balance of equities with respect to the last three factors alone strongly favors the Government, as disclosure in this case prior to appeal will cause irreparable harm to the Government but essentially no harm to plaintiffs or the public. "[O]nce there is disclosure" in a FOIA matter, "the information belongs to the general public," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), any information the Government sought to protect is irretrievably lost, and its appeal is moot. "Disclosure followed by appeal after final judgment is obviously not adequate in such cases—the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

Thus, in FOIA cases, courts routinely grant stays of disclosure, for "denial of a stay will utterly destroy the status quo . . . but the granting of a stay will cause relatively slight harm to appellee." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *see HHS v. Alley*, 129 S. Ct. 1667 (2009) (Thomas, J., in chambers) (staying FOIA disclosure pending disposition of appeal); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (denial of stay of FOIA order would cause mootness and thus irreparable injury); *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 n.3 (2d Cir. 2005) (noting court granted a stay of FOIA disclosure order). Here, there can be no question that release of the photographs at issue would destroy the status quo and moot any review by this Court. That in itself is a powerful—and indeed dispositive—reason to grant a stay.

In addition, the absence of a stay will cause the disclosure of records that the Secretary of Defense has certified to be exempt from disclosure under the PNSDA, a statute that was enacted by Congress in order to protect U.S. citizens, members of the U.S. Armed Services, and U.S. Government employees from harm while overseas. *See, e.g.,* 155 Cong. Rec. at S5672 (daily ed.) (Amendment 1157) (statement by Sen. Graham) (describing question posed to General

Petraeus, General Odierno, and others regarding the very photographs that remain at issue in this case as whether "the public release of these pictures [will] endanger America, American military personnel, and American Government personnel serving overseas," and describing the answer received as a "loud and clear: Yes, it will"); 155 Cong. Rec. at S5987 (daily ed.) (statement of Senator Lieberman) (explaining that "the language in the bill . . . is clear . . . in that it would apply to the current ACLU lawsuit and block the release of these photographs, preventing the damage to American lives that would occur from that release"). The protection of these individuals is surely in the public interest.

On the other hand, a stay would cause no appreciable harm to plaintiffs. Any harm consists solely of a minimal delay in the release of the photographs pending resolution of the Government's appeal, should plaintiffs prevail on appeal. Such delay is outweighed by the substantial and irreparable harms to the Government and the public interest identified above, and the harm to the judicial process of not permitting full and fair appellate consideration of the district court's decision. *Providence Journal*, 595 F.2d at 890.

Furthermore, while the Government's need to show likelihood of success on appeal is lessened where, as here, the balance of equities strongly favors a stay, *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d at 170 ("more of one factor excuses less of the other"), the Government also has strong case for success on the merits.

First, the district court erred in concluding that the Secretary's certification was subject to judicial review. The PNSDA is not subject to FOIA and independently precludes the release of the DoD Photographs by the Secretary of Defense. The PNSDA states that "notwithstanding any other provision of the law to the contrary, no protected document . . . shall be subject to disclosure under section 552 of title 5, United States Code or any other proceeding under that

section." PNSDA, § 565(b). A "notwithstanding" clause such as this preempts any prior statute, including FOIA, which the PNSDA specifically references. *See, e.g., Lockhart v. United States,* 546 U.S. 142, 144-146 (2005). Thus, Congress clearly prohibited disclosure of protected documents such as these under FOIA and any proceeding under FOIA.

The district court held that the PNSDA is an Exemption 3 statute within the meaning of FOIA, but then concluded that it could conduct a broad, *de novo* review of the Secretary's determination of the risk of harm, and that the Government therefore was obligated to provide the factual basis for the Secretary's harm determination. Dkt. 513 (Order of August 27, 2014, at 7. Even if the PNSDA subject to FOIA and thus is properly interpreted as an Exemption 3 statute, however, the Secretary's certification, by itself, should have been sufficient to protect from disclosure the detainee photos at issue. FOIA Exemption 3 permits the withholding of records where that withholding is authorized by a separate statute. *See* 5 U.S.C. § 552(b)(3). Courts addressing FOIA Exemption 3 perform only a limited *de novo* review to determine whether the records withheld fall within the scope of the statute, here the PNSDA. *See A. Michael's Piano*, 18 F.3d 138, 143 (2d Cir. 1994). Because the Government has shown that the DoD Photographs meet all of the requirements of "protected documents" under the PNSDA, including by providing a certification from the Secretary of Defense that their disclosure "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States," the DoD Photographs fall within the statute's scope and are exempt from disclosure under Exemption 3. Dkt. 497 (Renewal Certification of Secretary Panetta, Exhibit D to Declaration of Amy A. Barcelo, dated February 11, 2014).

Indeed, the language and structure of the PNSDA confirms Congress's intent that the

Secretary's harm determination is not subject to judicial review. Under the plain meaning of the PNSDA, a record's status as a "protected document" does not depend on whether the Secretary was accurate in his determination of harm, but rather on the existence of a certification containing Congressionally-mandated language. *See* PNSDA § (c)(1)(A). Requiring a certification with specific content provides a clear guideline for a court to determine whether records constitute "protected documents" as defined by the statute, and avoids second-guessing the Secretary's judgment in military matters regarding the safety of U.S. troops and citizens. There is no language in the PNSDA that requires the Secretary to provide the basis for his certification decision (or to obtain evidence of the anticipated harm before he makes his decision). The absence of such language strongly suggests that the Secretary's harm determination is intended to be unreviewable. Nor did the district court interpret the PNSDA to require any evidence supporting the Secretary's harm determination.

Congress's intent to preclude judicial review of the Secretary's harm determination is also reflected in Congress's decision to monitor the certification process. The PNSDA requires the Secretary to provide "timely notice" to Congress any time a certification or recertification is issued. PNSDA § (d)(4). By also limiting the life of a certification to three years, the PNSDA requires the Secretary to reassess whether the dangers and harms remain present in order to issue a recertification, *id.* § (d)(2), (3), and provide Congress with notice. Congress's own involvement in the review of the certification process under the PNSDA reflects its intent that judicial review of the certification process is not required.

The lack of judicial review of the Secretary's harm determination is consistent with case law interpreting statutes that, like the PNSDA, involve national security, and where review would invite courts to second-guess Executive Branch determinations regarding national security

that are committed to its discretion. *See, e.g.*, *Webster* v. *Doe*, 486 U.S. 592, 601 (1988); *Dep't of Navy* v. *Egan*, 484 U.S. 518, 527 (1988); *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993). And it is well settled in the FOIA context that courts must defer to Executive Branch judgments regarding the potential harm to national security from disclosure. *See ACLU* v. *DOJ*, 681 F.3d 61, 69 (2d Cir. 2012); *Wilner* v. *NSA*, 592 F.3d 60, 73 (2d Cir. 2009). The district court seemed to recognize as much in reviewing Secretary Gates's certification. *See* Dkt. 474 (Tr. of July 20, 2011, at 21 (PNSDA "requires me to accept the point of danger"), 23 ("I will not opine that there is or is not a danger in the battlefield because of the disclosure of pictures of this sort."), 36 ("it was clear to me that Secretary Gates had a rational basis for his certification and that I could not second-guess it")). The Government, therefore, has a strong argument that the district court erred in conducting a broad, *de novo* review of Secretary Panetta's certification that included review of whether there was an adequate factual basis for the Secretary's harm determination.

Moreover, even if the district court were correct that judicial review of the Secretary's certification was appropriate, the district court erred in rejecting the certification here. The Government submitted the recommendations of three generals (upon which the Secretary relied), explaining the harms that were reasonably anticipated to flow from release of the photos. Those recommendations, if reviewed deferentially, as the law requires, plainly establish that the Secretary's certification was rational and should have been upheld. The district court, however, simply made its own assessment as to the likelihood of harm, based upon its own analysis of the military situation in Iraq. That was reversible error.

The district court further erred in concluding that Secretary Panetta's certification was deficient because he failed to consider each photograph individually, rather than collectively, before issuing his certification. Nothing in the text of the PNSDA precludes the Secretary from

collectively certifying a group of photos, so long as the Secretary has concluded that disclosure of those photos, as a group, would endanger U.S. citizens, members of the Armed Forces, or U.S. Government employees abroad. Although the language of the statute provides that the Secretary shall issue a certification "[f]or any photograph" that is a protected document and whose release would cause the specified harm, PNSDA § (d)(1), the singular use of "photograph" would have been understood by Congress to apply to multiple photographs as well. *See* Dictionary Act, 1 U.S.C. 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things."). Moreover, the legislative history of the PNSDA makes clear that both President Obama and Congress understood the Act would protect a group of photographs from disclosure – indeed, the very photographs at issue in this case.

The district court here went far beyond merely requiring that each photograph be certified, dictating the precise procedures that were required, even though none of those requirements is included in the PNSDA. For instance, while insisting that the Secretary could delegate tasks related to certification, the district court nonetheless required that the Secretary "demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders' conclusions." Dkt. 543 (Order of February 18, 2015, at 2). And the court ruled out a process (used here) in which a DoD employee views all of the photos and provides representative samples to the commanders who provide their analysis of the potential harms to the Secretary. *Id.* at 2. Finally, the court held that the certification must "at a minimum" describe the objectionable content contained in the photograph and specify the type of harm likely to occur from its release. *Id.*

None of those requirements appears in the statute. The district court's approach, therefore,

is inconsistent with the principle that a court cannot "impose upon the agency its own notion of which procedures are 'best.'" *See, e.g., Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544-45, 549 (1978). It is also inconsistent with the principle that, when an agency head has made a decision, "courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination." *Nat'l Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974); *see also United States* v. *Morgan*, 313 U.S. 409, 420 (1941) (where Congress has delegated a decision to an agency, "[i]t is not for [the court] to try to penetrate the precise course of the [agency's] reasoning" and determine precisely which materials the Secretary looked at and considered in making his decision). Dkt. 530.

Finally, even if the district court were correct that the statute requires an individualized review of the photos, DoD did conduct an individualized review of the photographs here. As explained in the Government's supplemental declaration, a DoD employee, as the Secretary's delegee, reviewed each of the photographs at issue prior to the certification.

For all these reasons, the Government has a strong likelihood of success on appeal in showing that the district court erred in determining that Secretary Panetta's certification was insufficient and that the photographs must be disclosed.

Conclusion

The Government's motion for a stay pending appeal should be granted.

Dated: New York, New York
May 15, 2015

Respectfully submitted,

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